

## REMARKS

In the Non-final Office Action mailed on January 23, 2009, claims 1-6, 8-19, 27-32 and 34-38 were pending. Claims 1-4, 9, 14, 16, 19, 27-30, 36 and 38 stand rejected, and claims 5, 6, 8, 10-13, 15, 17, 18, 31, 32, 34, 35 and 37 are objected to but indicated to be allowable if rewritten in independent form incorporating the base claim and any intervening claims. Reconsideration of the present application in view of the following remarks is respectfully requested.

Claims 1-4, 9, 14, 16, 19, 27-30, 36 and 38 stand rejected under 35 USC §102(b) as being anticipated by U.S. Patent No. 5,048,971 to Wall et al. The Office Action asserts that Wall discloses “a central distractor (Fig. 1, ref. 11) in said chamber of said guide sleeve housing, said central distractor including a distractor tip movably positionable from a location between said first and second working channel ports (Fig. 1, near ref. numeral 20a)”. The Office Action further asserts that ref. 2 is the guide sleeve housing and that refs. 3 and 4 are the first and second working channel ports.

It is respectfully submitted that Wall does not disclose that paddle member 11 includes a distractor tip that is movably positionable from a location between cylindrical chambers 3, 4. Rather, paddle member 11 is located in cylindrical chamber 4 and is not “a distractor tip movably positionable from a location between said first and second working channel ports...” as recited in claim 1.

Claim 1 also recites that “said distractor tip including upper and lower distraction surfaces defining a distraction height therebetween to maintain distraction of a spinal disc space”. Wall discloses that paddle member 11 is provided with lobed end faces presented at the opposite faces of the paddle member having a two lobed profile at the front face 20 with two flanks 20a between two crests 20b and a generally triangular rear end face 21 with a single lobed profile. See col. 3, lines 10-21. There is no disclosure that paddle member 11 include a distraction height to maintain distraction of a spinal disc space. Therefore, claim 1 is allowable for this additional reason along with claims 2-4, 9, 14, 16 and 19 depending therefrom.

Claim 27 recites the surgical instrument includes the following elements: 1) a shaft with an engaging portion at a distal end of the shaft and the engaging portion has an enlarged configuration extending outwardly from the shaft; 2) a distractor tip that extends distally from

the enlarged engaging portion; 3) a member that is a guide sleeve housing with a proximal portion defining a chamber and a distal portion defining first and second access ports; and 4) the enlarged configuration of the engaging portion at the distal end of the shaft is sized and shaped to fit in the proximal chamber of the guide sleeve housing with a close interfit to provide a rigid assembly between the engaging portion and the guide sleeve housing.

The Office Action asserts that Wall discloses “a shaft (Fig. 1, ref. 11, proximal portion); and engaging portion at a distal end of said shaft (Fig. 1, middle portion of ref. 11); and a distractor tip extending distally of said engaging portion (Fig. 1, distal portion of ref. 11), wherein said engaging portion has an enlarged configuration (Fig. 1) and extends outwardly from each of said shaft and said distractor tip (Fig. 1)(Fig. 4a-7b), said enlarged configuration being sized to and shaped to fit in said proximal chamber with a close interfit to provide a rigid assembly between said engaging portion and said guide sleeve housing (Fig. 1).” It is respectfully submitted that Wall discloses that paddle member 11 does not include an engaging portion with an enlarged configuration that is sized and shaped to fit in chamber 4 with a close interfit to provide a rigid assembly between paddle member 11 and housing 2. Rather, as shown in Fig. 1, chamber 4 is open between housing 2 and at least one side of paddle member 11 to provide an avenue for the passage of material through chamber 4 as the material is mixed. Fig. 3a shows a cross-section at the front end face of paddle members 10, 11 where three channels 36, 37 38 are formed by chambers 3, 4 of housing 2, and Fig. 3f shows a cross-section at the rear face of paddle members 10, 11 where channel 39 is formed by chambers 3, 4 of housing 2. See col. 4, lines 28-55. Therefore, Wall does not anticipate claim 27 or claims 28-30 depending therefrom. Withdrawal of the rejection of claim 27 is respectfully requested.

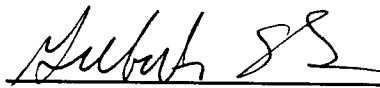
Claim 36 recites, among other features, “a central distractor in said chamber of said guide sleeve housing, said central distractor including a distractor tip at a location between said first and second working channel ports, said distractor tip including upper and lower distraction surfaces defining a distraction height therebetween to maintain distraction of a spinal disc space.” As discussed above with respect to claim 1, this arrangement of elements is not disclosed or suggested in Wall. Therefore, withdrawal of the rejection of claim 36 along with claim 38 depending therefrom is respectfully requested.

In view of the foregoing remarks, it is respectfully submitted that the present application is in condition for allowance with pending claims 1-6, 8-19, 27-32 and 34-38. Reconsideration of the present application is respectfully requested. Timely action towards a Notice of Allowance is hereby solicited. The Examiner is encouraged to contact the undersigned by telephone to resolve any outstanding matters concerning the present application.

Respectfully submitted,

4-9-09

Date



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